Contextual Constructions and Clear-Cut Tests: The Interpretation of Business Interruption Provisions in Insurance Contracts

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The recent Court of Final Appeal decision in *New World Harbourview Hotel Co Ltd v ACE Insurance Ltd* reaffirms the courts' approval of the contextual approach toward the construction of commercial contracts generally, and the importance of clear-cut tests, particularly with regard to determining the scope of indemnity coverage in insurance contracts.

Facts

This Court of Final Appeal case concerned the construction of an insurance policy on which the appellants sought to rely in order to recover losses sustained from an interruption to their businesses caused by Severe Acute Respiratory Syndrome (SARS) in 2003. The critical provision for construction was cl 14.5 of the insurance policy, which read as follows:

> "This Policy is extended to insure actual loss sustained by the Insured, resulting from a Reduction in Revenue and increase in Cost of Working as a result of … infectious or contagious disease … occurring on the Premises of the Insured *or* of a notifiable human infectious or contagious disease occurring within 25 miles of the Premises." (Emphasis added.)

The appellants (who were owners or operators of convention centres, hotels, car parks, etc) claimed that their loss was covered by the second cause listed in the clause, namely from a "notifiable human infectious or contagious disease occurring within 25 miles of the premises".[1] The policy's insurance coverage period was 1 July 2002 to 1 July 2003.

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[1] It was undisputed that the 25-mile condition would be satisfied once such a disease occurred anywhere in Hong Kong.

The earliest of the losses claimed by the appellants was from 9 March 2003 which, although falling within the insurance period, occurred *before* 27 March 2003 which was the date on which SARS became a "notifiable" disease under the Quarantine and Prevention of Diseases Ordinance (Cap 141) (QPDO).[2]

Background to the SARS Outbreak

The following undisputed chronological facts were taken from a report entitled "SARS in Hong Kong: From Experience to Action" (the Report) released by the Government's SARS Expert Committee on 2 October 2003 and were important to the determination of liability under the insurance policy:

- 10 February 2003: Hong Kong media reported an outbreak of a pneumonia-like disease in Guangdong;
- 11 February: Guangzhou Bureau of Health confirmed this outbreak—World Health Organisation (WHO) announced that it had received reports from Chinese authorities of an epidemic of acute respiratory syndrome, with 300 cases and five deaths in Guangdong—in Hong Kong, the Hospital Authority convened a Working Group to establish a surveillance system for cases of atypical pneumonia in public hospitals;
- 12 February: Working Group set out procedures for *requesting* notification by public hospitals to the Department of Health of any cases of severe community-acquired pneumonia (CAP);
- 13 February: the same request for notification was made to private hospitals;
- 22 February: a Chinese visitor (Patient AA – the most likely source of the outbreak of SARS in Hong Kong), after arriving in Hong Kong the previous day, was admitted to hospital;
- 4 March: Patient AA died;
- 12 March: WHO issued a global alert notice about cases of acute respiratory syndrome in Hong Kong, Guangdong and Vietnam;
- 15 March: WHO issued an emergency travel advisory statement, identifying the disease as "SARS" for the first time;

[2] Ie when the Hong Kong Government added SARS to the list of infectious diseases in Sch 1 of the QPDO. Note that this ordinance has since been replaced by the Prevention and Control of Disease Ordinance (Cap 599).

- 22 March: scientists discovered the cause of SARS;
- 27 March: Hong Kong Government added SARS to the list of infectious diseases under Sch 1 of the QPDO making it *mandatory* for SARS cases to be notified to the Government;
- mid-April: it was confirmed that Patient AA (who had died on 4 March 2003) had died of SARS;
- 23 June: SARS epidemic was officially declared over.

Issue(s) before the Court

As was acknowledged in the leading judgment given by Sir Anthony Mason NPJ,[3] the grant of leave to appeal to the Court of Final Appeal was seemingly confined to one issue,[4] that is: on the proper interpretation of the insurance policy, and on the facts set out in the Report, on what date did SARS become a "notifiable human infectious or contagious disease" within the meaning of cl 14.5?

However, the court briefly dealt with a second issue, that is: what is the commencement date of coverage under cl 14.5 with regard to losses resulting from SARS?

The Court's Findings

The First Issue

On the first issue, the Court of Final Appeal unanimously agreed with the findings of both the Court of First Instance and the Court of Appeal that "notifiable" in cl 14.5 referred to a *legal or mandatory requirement* to notify.

Reaction to the appellants' argument

The appellants had argued that such an interpretation of "notifiable" was too narrow and should, instead, simply include infectious or contagious diseases which were serious enough to warrant notification to the authorities, as a matter of prudence, such as the (non-mandatory) administrative scheme of *requesting* notification (introduced on 12 and

[3] At [9].

[4] There were five preliminary issues for determination before the Court of First Instance and Court of Appeal.

13 February 2003). The appellants had further argued that, even if such a reading is not clear, the interpretation should be *contra proferentem*. However, the Court of Final Appeal identified various problems with such a contention.

The first problem would be that, *if* "notifiable" simply referred to those diseases serious enough to warrant notification, *when* would a disease be so serious as to warrant such notification? According to the court, "[t]his is a question on which medical minds might be expected to differ".[5] The second problem with the appellants' argument, according to the court, would be that the administrative scheme of *requesting* notification (introduced on 12 and 13 February 2003) is inconsistent with the notion inherent in the appellants' contention (and in cl 14.5) that a "notifiable" disease is a *serious* disease. According to the court, "[a] serious disease … would *require* notification".[6] The third problem identified by the court is the lack of definition or description of the *class of persons* being requested (on 12 and 13 Feburary 2003) to notify the Department of Health, other than the hospitals. According to the court, "[s]urely such a … scheme would need to extend … to *all* medical practitioners and carers".[7] The fourth problem is that it was unclear, under the scheme (introduced on 12 and 13 February 2003), which *type* of case should be notified: a specific disease or the more vague concept of pneumonia-like symptoms which were characteristic of CAP. According to the court, the description of the type of case which was being requested to be reported was "imprecise, to say the least".[8]

The correct interpretation: a contextual approach

Citing various authorities,[9] the Court of Final Appeal firmly restated the correct approach to the interpretation of *all* commercial contracts:

> "The interpretation which should be adopted in the case of an insurance contract, as with other commercial contracts, is that which gives effect to the context, not only of the particular provision but of the contract as a whole, consistently with the sense and purpose of the provision […]. In arriving at the true interpretation, the court will read the words and expressions of

[5] At [32], *per* Sir Anthony Mason NPJ. Related to this point, Reyes J (at first instance) noted the potential for a "protracted and expensive examination" if the appellants' proposed interpretation was accepted. *See* [2010] 2 HKLRD 744, [41].

[6] At [33], *per* Sir Anthony Mason NPJ, emphasis added.

[7] *Ibid*., emphasis added.

[8] *Ibid*.

[9] *Canelhas Comercio Importacao e Exportacao Ltda v Wooldridge* [2005] 1 All ER (Comm) 43, 48; *Algemeene Bankvereeniging v Langton* (1935) 51 L1 L Rep 275, 281; and *Jumbo King Ltd v Faithful Properties Ltd* (1999) 2 HKCFAR 279, 296.

> the contract as ordinary commercial people would understand them in their context …"[10]

The court then emphasised that, where there is ambiguity, the clause would be interpreted *contra proferentem*, recognising that this principle has been said to "strongly" apply in the interpretation of *insurance* contracts.[11]

Applying the contextual approach to the facts in this case

After surveying the various dictionary definitions of the word "notifiable" in the context of infectious or contagious diseases, the court acknowledged that the leading dictionaries "do not speak with a single voice"[12] as to whether such notification is a mandatory legal obligation. However, the court thought that, since the leading *medical* dictionaries attribute a *legal obligation* to the word "notifiable" in this context, "commercial people would look to the medical understandings and expect and intend their words to be understood accordingly".[13] As such, the court concluded that the phrase "notifiable human infectious or contagious disease" in the insurance policy referred to such a disease which is *required by law* to be notified to the relevant authorities. This interpretation, the court believed, is not only consistent with most dictionary definitions but also "gives effect to the immediate context".[14]

The court also accepted other contexts in support of its conclusion. First, it was noted that cl 14.5 provided for *two* causes of loss from infectious or contagious diseases: one where *any* infectious or contagious disease occurs "on the Premises", and one where a *notifiable* infectious or contagious disease occurs "within 25 miles of the Premises". In light of this more stringent requirement where an infectious or contagious disease occurred *away* from the premises, the court thought that it was appropriate to give the word "notifiable" a "clear and certain meaning".[15]

[10] At [34], *per* Sir Anthony Mason NPJ. Note also that Bokhary PJ ([2]) added similar approval to such a contextual analysis, quoting Willes J in *Kidston v Empire Marine Insurance Co Ltd* (1865-66) LR 1 CP 535, 546 that the question of construction is "not as to the extension of which [the term to be construed] is *capable*, but of the sense in which it *ought* to be understood in the particular context with which it is to be reconciled" (emphasis added).

[11] At [34], *per* Sir Anthony Mason NPJ, citing *Re Arbitration Between Etherington and Lancashire and Yorkshire Accident Insurance Co* [1909] 1 KB 591, 596. However, note that Bokhary PJ ([2]) also emphasised that where the meaning is clear, the *contra proferentem* rule does not apply.

[12] At [36], *per* Sir Anthony Mason NPJ.

[13] At [38], *per* Sir Anthony Mason NPJ.

[14] *Ibid*.

[15] At [39], *per* Sir Anthony Mason NPJ. Indeed, Reyes J (at first instance) thought that the parties were more likely to have entered into the insurance contract on the basis that there was a "clear-cut test" for determining whether a disease was "notifiable", "[g]iven the importance of certainty to commercial parties". *See* [2010] 2 HKLRD 744, [41].

Secondly, it was noted that it was common knowledge that there exist statutory regimes in many jurisdictions which provide for mandatory notification of specified infectious or contagious diseases. As such, the court thought that the parties "would have been well aware" of this and "would have contracted with that knowledge in mind".[16]

As such, the court concluded the first issue, stating:

> "It cannot be doubted that, against this background, commercial people would read the words in question as referring to infectious or contagious diseases which are *required by law* to be notified to a public authority. So read, the words in question provide a clear and certain criterion for determining whether a disease is 'notifiable'."[17]

Such clarity, and the absence of ambiguity, meant that there was nothing to attract the *contra proferentem* principle as an aid to construction.[18]

The Second Issue

On the second issue, the Court of Final Appeal agreed with the findings of both the Court of First Instance and the Court of Appeal that the commencement date of coverage for losses resulting from SARS was 27 March 2003.

The appellants referred to the absence, in cl 14.5, of any stipulation that an insured can only recover loss sustained *after* SARS became "notifiable". Rather, they argued, the only requirement was that the loss resulted from a "notifiable" infectious or contagious disease, which SARS *eventually* became, and therefore any loss caused by SARS *before* it became so "notifiable" could still be indemnified so long as it was incurred within the policy's period of coverage (that is, 1 July 2002 to 1 July 2003).

However, the court simply pointed out that the appellants' argument fails to appreciate that the cause of the loss must be a "notifiable" infectious or contagious disease and that such a disease does not become so "notifiable" until it is *legally required* to be notified which, as already found, was the 27 March 2003. Therefore, *before* that date, any loss incurred as a result of SARS was *not* caused by a "notifiable" disease capable of being indemnified under cl 14.5. According to the court:

[16] At [40], *per* Sir Anthony Mason NPJ.
[17] *Ibid.*, emphasis added.
[18] At [42], *per* Sir Anthony Mason NPJ.

> "Clause 14.5 incorporates a discrete indemnity and requires effect to be given to the expression '*notifiable* human infectious or contagious disease' *according to its true interpretation*."[19]

Comment

This recent Court of Final Appeal decision makes clear that provisions in insurance contracts, as with all commercial contracts, should be construed contextually, with regard to the contract as a whole, consistent with how they would be understood by ordinary commercial men. The court cited and relied on an English Court of Appeal case[20] (also concerning the interpretation of an insurance contract) where Mance LJ stated that:

> "The proper approach is to interpret the wording of the relevant clause as a whole in the context of this policy as a whole. The interpretation should be through the eyes of an ordinary commercial man …"[21]

In the instant case, the court then went on to cite and approve one of its own earlier judgments—*Jumbo King Ltd v Faithful Properties Ltd*[22]—where Lord Hoffmann NPJ stated that:

> "The construction of a document is not a game with words. It is an attempt to discover what a reasonable person would have understood the parties to mean. And this involves having regard, not merely to the individual words they have used, but to the agreement as a whole, the factual and legal background against which it was concluded and the practical objects which it was intended to achieve."[23]

However, in that case, Lord Hoffmann NPJ also stated that it was "the overriding objective", when construing contracts, to give effect to what a "reasonable person"[24] rather than a "pedantic lawyer" would have understood the parties to have intended.[25] Whereas, in the instant case,

[19] At [45], *per* Sir Anthony Mason NPJ, emphasis added.
[20] *Canelhas Comercio Importacao e Exportacao Ltda v Wooldridge*.
[21] *Ibid*., 48. Mance LJ went on to justify this proposition by reference to the leading House of Lords case of *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912 where Lord Hoffmann summarised the general principles of contractual interpretation.
[22] (1999) 2 HKCFAR 279.
[23] *Ibid*., 296.
[24] Ie one who would be privy to all the background knowledge reasonably available to the parties (*see Investors Compensation Scheme Ltd v West Bromwich Building Society*, 912), in this context: an ordinary commercial man.
[25] *Jumbo King Ltd v Faithful Properties Ltd*, 296.

Sir Anthony Mason NPJ stated that such an interpretation as understood by ordinary commercial men would be preferred "in appropriate cases"[26] to any technical meaning. This then raises the question as to *when* it might *not* be appropriate for the court to prefer the meaning attributed to the words by ordinary commercial men. Although this might be thought to undermine certainty, such a qualification may provide a little flexibility for the courts to attribute a different meaning where justice requires, such as, for example, where one party is clearly trying to escape from a bad bargain.

Nevertheless, commercial certainty seems to be a recurrent theme throughout each level of these proceedings.[27] At each stage, the case illustrates the emphasis laid by the Hong Kong courts on the need for certainty with regard to contractual interpretation. In particular, the courts seem to favour clear-cut tests in ascertaining the meaning of provisions in insurance policies, so as to avoid protracted litigation in determining the scope of coverage. As such, this recent Court of Final Appeal decision will no doubt serve as a welcome aid to other potential litigants who seek to establish the true scope of similar business interruption provisions in Hong Kong insurance policies.

[26] At [34].
[27] *See*, for example, Reyes J, [2010] 2 HKLRD 744, [41].